A

MAYBAN TRUSTEE BHD

v.

AMALAN TEPAT SDN BHD

B

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-76-2003]
21 NOVEMBER 2005

C ***CIVIL PROCEDURE:*** *Action - Consolidation of actions - Conditions to be satisfied - Rules of the High Court 1980, O. 4 r. 1(1)(a), (b), (c)*

This was the defendants' application seeking an order to transfer the proceedings of the Melaka High Court originating summons no. 24-202-2003 between the Bank Pertanian Malaysia and
D Amalan Tepat Sdn Bhd, the first defendant herein ('the Melaka originating summons') to the Seremban High Court, and to consolidate the Melaka originating summons with the instant originating summons ('the Seremban originating summons'). The
E plaintiff submitted that there were no grounds for consolidation as (1) none of the conditions under O. 4 r. 1(1) of the Rules of the High Court ('RHC') has been fulfilled; and (2) that the involvement of the same land in both the Melaka originating summons and the Seremban originating summons was not sufficient
F to obtain.

Held (dismissing the application):

[1] The defendants failed to state the common question of fact or law that was to arise in the two originating summonses.
G Hence, quite apart from the common subject matter, the court was unable to accept the contention that O. 4 r. 1(1)(a) has been fulfilled. (p 47 D)

[2] The Seremban originating summons concerned the plaintiff's
H claim against the defendants for alleged breach of trust and damages incurred thereby, on the basis of a trust deed dated 9 November 1993, whereas the Melaka originating summons was a charge action brought by a completely different plaintiff *ie*, Bank Pertanian Malaysia for an order for sale under O. 83
I of the Rules of the High Court 1980 pursuant to BPM's right as a registered chargee. These originating summonses were therefore entirely different and would certainly involve different

issues and arguments, on the basis of different facts and circumstances. Hence, they could hardly come within the ambit of O. 4 r. 1(1)(b) of the RHC. (p 47 G - H)

[3] Relying on O. 4 r. 1(1)(c) of the RHC, it was argued for the defendants that it was desirable to make an order for consolidation as that would, *inter alia*, save costs and time for the parties and the court. The court was of the view that saving of costs and time, and the solicitors' convenience, was more illusory than real in view of the different plaintiffs, different causes of action, different issues and different arguments. The court was therefore unable to see the merits of the defendants' contention based on O. 4 r. 1(1)(c) of the RHC. (p 48 A - B)

[4] The Melaka originating summons and the Seremban originating summons did not come within the scope of O. 4 r. 1(1)(a), (b) or (c). The defendants' application was hence devoid of merits. (p 48 F)

Case(s) referred to:
Central Securities (Holdings) Bhd v. Haron Mohamed Zaid [1979] 2 MLJ 244 ***(refd)***
Del E Webb International Hotel Co v. Hotel Merlin Penang Sdn Bhd [1973] 1 MLJ 31 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 4 r. 1(1)(a), (b), (c)

For the plaintiff - Wong Mae Foon; M/s Shook Lin & Bok
For the defendants - Lee Noushi; M/s Gideon Tan Razali Zaini

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application
This is the defendants' application by way of summons in chambers in encl. (22) seeking an order to transfer the proceedings of the Melaka High Court originating summons No. 24-202-2003 between Bank Pertanian Malaysia and Amalan Tepat Sdn Bhd, the first defendant herein ("the Melaka originating

summons") to the Seremban High Court, and to consolidate the Melaka originating summons with the instant originating summons ("the Seremban originating summons").

Factual Background

In the Seremban originating summons, the plaintiff claimed that by a trust deed executed on 9 November 1993 between the first defendant ("the chargor"), the second defendant ("A Famosa") and the plaintiff, the plaintiff was appointed to act as trustee for the members of the recreational club and golf course known as A'Famosa Golf Resort ("the club").

The chargor as owner of 6 lots of land ("the lands") by way of a lease in escrow leased a portion of the lands to A'Famosa for the development of the club ("the golf project land").

The chargor agreed, *inter alia*, that it will not encumber the golf project land in any way except with the plaintiff's prior written consent.

Through the first supplemental trust deed executed on 18 October 1994 between the chargor, A'Famosa and the plaintiff, the chargor and the plaintiff consented to the charging of the lands, including the golf project land, to Malayan Building Society Bhd ("the MBSB charge") to secure facilities granted by MBSB to the chargor to which the plaintiff has consented, on the chargor's undertaking to discharge the golf project land as soon as it was practicable.

The lands had been subdivided but the plaintiff alleged that the defendants have failed to honour their obligations under the trust deed to have the lease over the golf project land registered, nor to discharge the MBSB charge and are allegedly in breach of the trust deed.

The plaintiff's claim against the defendants is, *inter alia*, for damages and losses arising from the alleged breach of the trust deed and the first supplemental trust deed, in allegedly failing to register the lease in favour of A'Famosa in respect of lots held under HS (D) 3810 to 3823, No PT 81 to 93, Mukim Pegoh, Melaka ("the affected lots") and in allegedly failing to keep the lands unencumbered.

After the plaintiff's claim was filed, it was brought to the plaintiff's attention that the chargor has created a charge under presentation No. 684/1996 Jilid 516 Folio 52 over the affected lots to secure a loan of RM30 million granted to A'Famosa by Bank Pertanian Malaysia ("the BPM charge") allegedly without the plaintiff's prior written consent and allegedly in breach of the trust deed.

BPM has instituted the Melaka originating summons to obtain an order for sale of the lands pursuant to the BPM charge which would include, *inter alia*, the golf project land.

The defendant had also filed a similar application in the Melaka High Court to transfer the Melaka originating summons to the Seremban High Court and to consolidate the Melaka originating summons with the Seremban originating summons. The Melaka originating summons has been filed in Melaka High Court 2, and not in my court ie, Melaka High Court 1.

Consolidation

Miss Wong Mae Foon plaintiff's learned counsel submitted that there are no grounds for consolidation, as none of the conditions under O. 4 r. 1(1) of the Rules of the High Court 1980 has not been fulfilled, and that the involvement of the same land in both the Melaka originating summons and the Seremban originating summons is not sufficient to obtain. Support was sought in *Central Securities (Holdings) Bhd. v. Haron bin Mohamed Zaid* [1979] 2 MLJ 244.

Defendants' learned counsel Miss Lee Noushi also relied on O. 4 r. 1(1) and *Central Securities*, *supra*, in addition to *Del E. Webb International Hotel Co. v. Hotel Merlin Penang Sdn. Bhd.* [1973] 1 MLJ 31 HC, but added that there should be consolidation.

In my judgment, it is necessary to refer to O. 4 r. 1(1) which reads as follows:

1. Consolidation, etc of causes or matters (O. 4 r. 1)

(1) Where two or more causes or matters are pending, then, if it appears to the Court:

(a) that some common question of law or fact arises in both or all of them; or

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

A (c) that for some other reason it is desirable to make an order under this rule

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

In relation to O. 4 r. 1(1)(a), it is incumbent on the defendants to show that some common question of law or fact arises in the C Melaka originating summons and the Seremban originating summons. The only subject matter that is common to these two originating summonses relates to the same lands, but that *per se* does not come within O. 4 r. 1(1)(a) which prescribes the requirement of some common question of law or fact.

D Although O. 4 r. 1(1)(a) was cited for the defendants, their learned counsel did not state the common question of fact or law that was to arise in the two originating summonses. Hence, quite apart from the common subject matter, I am unable to accept the contention that O. 4 r. 1(1)(a) has been fulfilled.

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Order 4 r. 1(1)(b) sets out the requirement that the rights to the relief claimed are in respect of or arise out of the same transaction or series of transactions. Instead of submitting on the defendants' fulfilment of this condition, defendants' learned counsel conceded F that the reliefs applied for in the Melaka originating summons and the Seremban originating summons conflict with the interest of the respective plaintiffs.

It is pertinent for me to point out that the Seremban originating G summons concerns the plaintiff's claim against the defendants for alleged breach of trust and damages incurred thereby, on the basis of the trust deed dated 9 November 1993, whereas the Melaka originating summons is a charge action brought by a completely different plaintiff ie, Bank Pertanian Malaysia for an order for sale H under O. 83 of the Rules of the High Court 1980 pursuant to BPM's right as a registered chargee. These originating summonses are therefore entirely different and would certainly involve different issues and arguments, on the basis of different facts and circumstances. Hence, they can hardly come within the ambit of I O. 4 r. 1(1)(b).

Relying on O. 4 r. 1(1)(c), it was argued for the defendants that it is desirable to make an order for consolidation as that would, *inter alia*, save costs and time for the parties and the court, besides being convenient to the solicitors. In my view, the saving of costs and time, and the solicitors' convenience are more illusory than real in view of the different plaintiffs, different causes of action, different issues and different arguments. I am therefore unable to see the merits of the defendants' contention based on O. 4 r. 1(1)(c).

Actions may be consolidated where eg, the plaintiffs are the same and the defendants are the same: per Raja Azlan Shah CJ (M) (now HRH The Sultan of Perak) in *Central Securities, supra,* at p. 251E left column. It is significant to note that this authority cited for the defendants would militate against the defendants as the Melaka originating summons and the Seremban originating summons involve different plaintiffs.

Again, where the claims in two actions were between the same plaintiffs and substantially the same defendants, and involve a common question of facts, then consolidation would be eminently suitable: per Chang Min Tat J (later FCJ) in *Dell E. Webb International Hotel Co, supra,* at p. 34A-B and H left column. In my view, the facts and circumstances prevailing in this application do not attract the support of this authority cited for the defendants.

Conclusion

It is crystal clear that the Melaka originating summons and the Seremban originating summons do not come within the scope of O. 4 r. 1(1)(a), (b) or (c). I therefore hold that the defendants' application is devoid of merits. It is dismissed with costs of RM300 to the plaintiff.